Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 92-264
	)	
Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-trafficking Provisions	)	
	)	
To: The Commission	)	

COMMENTS OF E! ENTERTAINMENT TELEVISION, INC.

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Summary

The 1992 Cable Act contains various provisions aimed at insuring fairness in program distribution practices, with the channel occupancy limits of Section 11 providing just one among several stronger measures that the Act includes for this purpose. Because Congress was not relying solely upon channel occupancy limits to produce certain public benefits, the Commission must balance the need for such limits against their disadvantages. E! is concerned that imposing occupancy limits will eliminate a much-needed source of program development capital and will make it even more difficult for new programmers to achieve viability.

E!, a vertically-integrated programming service, would not exist today but for the financial support of MSO investors at critical stages in the network's development. Nor would a host of other new and diverse programmers who serve viewer needs and preferences that have never been served by television before.

Accordingly, E! urges the Commission to tailor its channel occupancy limits in the least restrictive manner possible. E! supports tentative Commission conclusions that channel occupancy limits should apply only: (i) to carriage of programming services in which the system holds an attributable interest; (ii) when a system has limited channel capacity; and (iii) to carriage commencing after the rules go into effect. In addition, E! urges the Commission to restrict the limits to situations when comparable services are available from a non-affiliated programmer.

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COMMENTS OF E! ENTERTAINMENT TELEVISION, INC.

E! Entertainment Television, Inc. ("E!"), by its attorneys, hereby offers its comments with respect to the channel occupancy limits proposed in the Commission's Notice of Proposed Rule Making ("Notice") in the above-captioned proceeding. As one of the new generation of programming services, E! would not exist today had cable companies not stepped forward with financial support at crucial stages in the network's development. Thus, E! urges the Commission to avoid imposing limits on channel occupancy that unnecessarily deprive new program services of a much-needed source of capital. To do so would limit the diversity of program choices of viewers.

If the Commission wishes to encourage launches of new and more diverse programming services, it should not make it more difficult for program creators to obtain essential funding. Nor should the Commission penalize cable companies that are willing to risk investment in new programming ventures by circumscribing their ability to carry programming because of its ownership and without regard to its merit or attractiveness to subscribers. Section 11 of the 1992 Cable Act requires the Commission to "prescribe reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest." In considering what is "reasonable," the Commission must weigh the extent to which such limits are needed against such limits' disadvantages.

I. The Need for Channel Occupancy Limits:

Section 11 of the 1992 Act was intended to prevent cable companies holding an interest in particular programming services from unfairly discriminating in favor of their affiliated programmers to the exclusion or detriment of non-affiliated programming services.[1] As the Commission is aware, the Act contains other provisions that serve the same purpose. The Act's various channel set-asides guarantee that a substantial number of cable channels will carry programming

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[1] The House Report, for instance, cites submissions to the Committee alleging that some cable operators "favor programming services in which they have an interest, denying system access to programmers affiliated with rival MSDS and discriminating against rival programming services with regard to price, channel positioning, and promotion." House Committee on Energy and Commerce, ("House Report") H.R. Rep. No. 102-628, 102d Cong. 2d Sess. (1992) at 41.

from diverse sources.[2] The 1992 Act imposes additional restrictions on cable systems that have affiliation through ownership with programming services to insure that diverse voices are heard.[3] Because the interests addressed in Section 11 already are very well protected without reliance on channel occupancy limits, the need for such limits is minimal.

II. Disadvantages of Channel Occupancy Limits:

Both Congress and the Commission have recognized that without the continued support of MSO investors, E! and many other unique and innovative services such as Court TV, The Discovery Channel, Mind Extension University, Black Entertainment Television, Comedy Central, Bravo, American Movie Classics, Nickelodeon, CNN and The Learning Channel

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[2] Cable operators are required to carry non-affiliated programming on potentially more than one-third of their channel capacity by the must-carry rules (Sections 4 and 5 of the 1992 Act), on up to one-tenth of their channels pursuant to the commercial leased access requirements (Section 612 of the Cable Act), and on additional channels pursuant to local PEG access requirements permitted under Section 611 of the Cable Act.

[3] Section 19, for example, insures that multichannel video programming distributors have fair access to vertically-owned satellite cable networks. Section 12 regulates the terms of agreements between vertically-integrated programmers and programming distributors, again so that cable systems do not show undue favoritism to commonly-owned programming services.

would not be among cable subscribers' viewing options today.[4]

Imposition of limits on channel occupancy will unnecessarily block investment that fuels the proliferation of new programming. As a relative newcomer to the ranks of satellite programming networks, E! can testify to the obstacles that new programming services encounter. E!'s own history demonstrates how difficult it is for a new service to succeed and how the addition of even one more obstacle, such as channel occupancy limits, could be disastrous.

E! began in 1987, when the former general manager of a Los Angeles area cable system and a local real estate developer pooled their own money to start a new, movie-oriented program service. E!'s forerunner, called Movietime, was launched in two million homes as a service telecasting film trailers. The network grew steadily throughout its first two years until it reached 13 million households. There it plateaued, facing a need for more capital than its advertising revenues and subscriber fees provided (Movietime did not begin receiving affiliate fees until 1990) and also facing fierce competition from a growing number of other services for rapidly dwindling channel space.

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[4] The Senate Report recognized that since 1984, programming choices had increased about 50 percent. See Senate Committee on Commerce, Science and Transportation, S. Rep. No. 102-92, 102d Cong., 1st Sess. (1991). See also House Report at 41. The Commission's Notice also cites benefits of vertical integration at paragraphs 44 and 45.

Movietime received the financial support necessary to its continued development through an infusion of capital from cable companies bold enough to risk investment in the fledgling network.[5] Based on feedback from operators and a critical assessment of the network's future, the company revamped the programming concept of the network. In June of 1990, after an extraordinary creative overhaul involving the talent and commitment of professionals in the fields of programming, marketing and finance, the network was relaunched as E!. Initially it offered rotating short segments of entertainment news and information, with plans to expand into longer length programming in the future.

Today E! provides approximately 21,000,000 subscribers with news and information on the world of entertainment and serves as a unique electronic review of entertainment choices. From a state-of-the-art production facility located in the Los Angeles area, E!'s 350 employees produce some six hours of original programming each day, such as "The Whole World Is Watching," a recent one-hour documentary on the exporting of American entertainment.

As the experience of E! and its counterparts clearly demonstrates, severe limits on the number of cable channels

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[5] HBO, Warner Communications, Time Warner Cable, Comcast Cable Communications, Inc., Cox Communications, Inc., Continental Cablevision, Inc., NewChannels Corp. and United Cable Television Corp. all are investors in the service.

that can be occupied by programming in which a cable system holds an ownership interest will halt new launches and curtail the growth of innovative programming services. First, there will be even fewer channels on which cable-industry funded networks can be carried. For advertiser-supported networks, this will be yet another obstacle to achieving the requisite audience exposure for financial viability. To avoid this obstacle, a network must forego cable industry funding, for which there often is no adequate substitute, as demonstrated by the collapse of the Monitor Channel. Finally, if the number of channels that can be occupied by vertically-integrated programming services is too limited, the few available channels certainly will be claimed by program services that are more established and that have the widest appeal. Less established services serving the needs of smaller, more specialized audiences such as speakers of foreign languages, persons continuing their education, and, in E!'s case, entertainment buffs, will not be carried.

III. Proposals for Making the Limits Reasonable:

Given the host of statutory alternatives to channel occupancy limits, E! believes that the need for such restrictions is small. On the other hand, the disadvantages of imposing limits are great. E! therefore urges the Commission to proceed prudently and impose channel occupancy limits only to the extent absolutely necessary, as suggested below:

A. <u>Channel occupancy limits should apply to a cable system *only* with respect to programming services in which it holds an attributable interest.</u>

E! agrees with the Commission's tentative conclusion (Notice at ¶50) that whatever occupancy limits the rules contain should apply only to those services in which the cable operator in question actually holds an attributable interest. In fact, the Commission's 1990 Report on competition in the cable television industry recommended to Congress that limits of this nature should only apply in "areas served by the multichannel provider(s) with which that programming service is vertically integrated." <u>Report</u> in MM Docket No. 89-600, 5 FCC Rcd 4962, 5031-32 (1990). Furthermore, applying the limits to <u>any</u> programming service in which <u>any</u> cable operator has an ownership interest is unnecessary; a cable company would have no conceivable reason to favor programming in which it does not have a financial stake. Finally, such a broad interpretation of the provision unnecessarily would deprive cable subscribers of a host of unique, innovative and attractive programming simply because its development capital came from a particular source.

B. <u>The number of channels reserved for non-affiliated programming under this provision should be small.</u>

As shown above, other provisions of the Act -- must carry and access, for example, -- already require over 40% of a cable system's channel capacity to be set aside for occupancy by non-affiliated programming. System channels occupied by must-carry signals, leased access programming and PEG access programming should count as non-affiliated programming. Where a large number of such set-aside channels are in use for their intended purposes, sources of programming are diverse and there is less need to restrict operator discretion over program selection for the remaining channels. In addition, cable systems that provide access channels should not be penalized for or discouraged from doing so by denying them the opportunity to program other channels in the best interest of subscribers.

C. <u>Limits should not apply to services that have unique formats or are targeted to small, specialized audiences.</u>

As shown above, vertically-integrated programmers are responsible for some of the most innovative and unique programming services available today. Black Entertainment Television, a vertically integrated service, for example, is the only channel currently directed primarily to the black community. BET and its counterparts such as E! and The Learning Channel serve the needs of viewers whose programming preferences and interests have never been met before. The rules should be drafted to avoid depriving these audiences of their programming. E! recognizes the difficulty that the Commission would face in attempting to exempt program services on the basis of content or in trying to assess whether a comparable programming is available on a non-vertically integrated service.[6] E! submits, however, that the Commission could look for criteria other than content to identify unique or targeted services available only through a vertically integrated programmer but deserving of an exemption to the limits.

For example, the Commission could consider the amount of originally-produced programming that appears on a channel. A programming service that produces, 30% or more of its own daily, original programming is sufficiently distinct from other services to qualify for such an exemption. In addition, an exemption for services with substantial original programming is sound public policy because it will encourage the creation of new programs.

As an alternative, or in addition, to exempting services based on a threshold of original programming, the Commission could exempt a programming service unique on it face, such as a network directed at minorities or speakers of a particular foreign language.[7] Finally, an exemption for unique format

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[6] See, e.g., Development of Policy re: Changes in the Entertainment Formats of Broadcast Stations," 60 FCC2d 858 (1976).

[7] Similar public policy considerations gave rise to the Commission's former "specialty programming" rules, which exempted foreign language stations from limits on distant signal carriage by cable television systems. In addition,
(continued...)

or narrowly targeted programming could be based on audience size or penetration, because most systems that reach under 50% of all cable households (or fewer than 31,000,000 subscribers) tend to be newer networks that target more specialized audiences.[8]

D. Limits should not apply to systems with expanded capacity:

E! agrees with the Commission's prediction (Notice, at ¶53) that expanded channel capacity will eliminate the need for occupancy limits. As more channels are added, systems will need to obtain programming from whatever source is available. Exempting systems with expanded channel capacity from the limits also will encourage system expansion and technological innovation. E! supports a lifting of the limits from systems with 54 or more channels. Because expanded channels count toward the calculation of channel set-asides for must carry and leased access, an added measure of diversity is insured, even on larger capacity systems.

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[7](...continued)
Section 10 of the Act provides a definitional framework for minority programming.

[8] According to a November 1992 Cable Network Census published by Paul Kagan Associates, Inc., the following are among those services that have smaller market shares but nevertheless represent hundreds of millions of dollars in investment: Comedy Central (26.2 million households); Mind Extension University (21.9 million households); The Learning Channel (18.4 million households); The Travel Channel (17.5 million households); Nostalgia (14 million households); Sci-Fi Channel (10 million households); Bravo (9.5 million households); and Court TV (7.6 million households).

E. <u>Existing carriage should be grandfathered.</u>

E! supports the Commission's tentative determination to grandfather existing carriage that might cause a system to exceed whatever limits the Commission adopts. The need for further channel set-asides is not great enough to justify disruption of contractual relationships. Programmers such as E! make financial commitments for the production or acquisition of programming on the expectation of earning certain subscriber fees and advertising revenues. Binding contracts provide the programmers' best assurance that these important expectations will be met. The widespread, unexpected removal from systems' channel line-ups, with a corresponding loss of audience, would place programmers in an untenable situation. In addition, removal of existing services would disrupt subscriber viewing.

IV. <u>Conclusion</u>

Because the need for channel occupancy limits is minimal and the disadvantages of such limits are great, the Commission should implement Section 11 of the Act in the least restrictive manner possible. Above all, the Commission should avoid imposing unnecessary restrictions on the programming diversity. Rather, the rules should pursue the Congressional objective of fairness in program distribution practices while maintaining appropriate incentives for new program creation.

Respectfully submitted,

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